Supreme Court, U.S.
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No. 99-498

In The
# Supreme Court of the United States

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MICROSOFT CORPORATION, *et al.*,

*Petitioners,*

—v.—

DONNA VIZCAINO, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## RESPONDENTS' OPPOSITION TO MOTION FOR LEAVE TO SUBMIT *AMICI* BRIEF BY INFORMATION TECHNOLOGY ASSOCIATION, *et al.*

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## INTRODUCTION

Respondents oppose a motion for leave to file an *amici* brief by an organization (ITAA) in which petitioner Microsoft Corp. is a major member/contributor. The motion, dated Wednesday, October 20, 1999, was not served on Respondents' counsel until October 28, 1999. The motion is disfavored under Supreme Court Rule 37.2(b).

## ARGUMENT

The proposed *amici* brief states it is in support of Microsoft's petition. Proposed *amici* are Information Technology Ass'n of America (ITAA), of which Microsoft is a major member/contributor, and other trade groups. Although Microsoft is identified as a member of ITAA in its website,[1] contributing at least $44,000 per year, the interest of Microsoft in ITAA and Microsoft's contributions to the ITAA brief (direct or indirect) are not disclosed. Supreme Court Rule 37.6; 37.3(b).

The proposed brief sheds no light whatsoever on the principles of Washington state law on which the decisions below were based and which the ITAA purports to address here. The ITAA brief cites not even a single Washington case. The ITAA brief instead proposes, even though this case is governed by Washington law, that this Court should adopt, contrary to

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[1] www.itaa.org/about/members.cfm

*Erie RR v. Tompkins*, a rule of federal common law to govern this contract claim under Washington law -- *i.e.*, a rule that employers' forms mislabeling employees as "contractors" always control over the facts. ITAA's proposed rule of federal common law is not only contrary to the common law of Washington, it is also contrary to the general common law of agency (see *Restatement (2d) of Agency §220(2)*) applied throughout the United States. See *Nationwide Mutual Ins. v. Darden*, 503 U.S. 318, 322-24 (1992)(adopting general common law for purposes of defining "employee" under federal statutes including ERISA).

The proposed brief should be rejected.

DATED: November 8, 1999.

Respectfully submitted,

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